

**THIRD AMENDMENT TO
CONCESSION AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND
ALCLEAR, LLC**

This THIRD AMENDMENT TO CONCESSION AGREEMENT is entered into this ____ day of _____, 2019, by the CITY OF SAN JOSE, a municipal corporation of the State of California (“City”), and ALCLEAR, LLC, a Delaware limited liability company authorized to do business in the State of California (“Concessionaire”).

RECITALS

WHEREAS, on October 22, 2013, City and Concessionaire entered into a Concession Agreement entitled “CONCESSION AGREEMENT BY AND BETWEEN THE CITY OF SAN JOSE AND ALCLEAR, LLC” (“Agreement”); and

WHEREAS, on August 3, 2016, City and Concessionaire entered into a First Amendment to the Agreement to extend the term and add provisions required under federal law and regulations; and

WHEREAS, on September 26, 2016, City and Concessionaire entered into Second Amendment to the Agreement to extend the term, modify the Concession Area and Concessionaire’s Equipment; and

WHEREAS, City and Concessionaire desire to further amend the amended Agreement to extend the Term, modify the Concession Area, allow Concessionaire to conduct operations related to the Program (as defined herein) in areas outside of **Exhibit A**, subject to certain conditions, modify the Concessionaire’s Equipment, modify the Concession Fee, and add provisions required under federal law and regulations;

NOW, THEREFORE, effective upon full execution, the parties agree to amend the amended Agreement as follows:

SECTION 1. SECTION 1, "DEFINITIONS AND SUMMARY OF TERMS" are amended to read as follows:

"Expiration Date" (SECTION 2 TERM OF AGREEMENT): means the date October 21, 2022, subject to earlier termination as provided in this Agreement.

"Concession Area" (SECTION 3 AUTHORIZED ACTIVITIES) means the area designated as Concession Area, on **Exhibit A** attached hereto.

"Concession Fee and Charges" (SECTION 5 FEES AND DEPOSITS):

Minimum Annual Guarantee ("MAG") and Percentage Fee: Effective upon the MAG Commencement Date, Concessionaire shall pay the following MAG or Percentage Fee; whichever is greater:

- (a) Percentage Fee.
 - i. Effective upon the MAG Commencement Date and continuing through October 21, 2020, the Percentage Fee shall mean eleven percent (11%) of Gross Revenues.
 - ii. Effective October 22, 2020 and continuing through October 21, 2021, the Percentage Fee shall mean eleven and one half of a percent (11.50%) of Gross Revenues.
 - iii. Effective October 22, 2021 and continuing through the Expiration Date, the Percentage Fee shall mean eleven and three quarters of a percent (11.75%).

- (b) MAG. Effective upon the MAG Commencement Date, the MAG shall mean six hundred seventy-four thousand dollars (\$674,000).

Delinquent Report Fee	\$25.00 per calendar day
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“Concession Operations” (SECTION 3 AUTHORIZED ACTIVITIES) means: the installation, operation and maintenance of Concessionaire’s Equipment in support of the Private Sector Registered Traveler Program (“Program”) at the Airport, including marketing the Program, soliciting and accepting applications for Program enrollment at the Airport, including but not limited to the Concession Area in **Exhibit A.**”

SECTION 2. SECTION 1, “DEFINITIONS AND SUMMARY OF TERMS” are added to read as follows:

“MAG Commencement Date” (SECTION 5 FEES & DEPOSITS) means the date of full execution of this Third Amendment.

SECTION 3. SECTION 3, “AUTHORIZED ACTIVITIES” subsection 3.1 is hereby restated in its entirety to read as follows:

“3.1 Approvals

3.1.1 General Approvals. In consideration of Concessionaire's payment of the Concession Fee and all other fees and charges and the performance of all provisions of this Agreement and any amendment thereto, City grants to Concessionaire, and Concessionaire accepts from City, the right to install, operate, and maintain the Concession Improvements, if any, and Concessionaire’s Equipment and to conduct the Concession Operations at the Airport, including but not limited to the Concession Area set forth in **Exhibit A**; and

3.1.2 Specific Approvals

3.1.2.1. Director’s Prior Approval Required. Concessionaire shall

obtain advanced written approval by the Director, in Director's sole discretion, prior to conducting Concession Operations at any portion of the Airport other than the Concession Areas. Notwithstanding the Director's approval, Concessionaire will be solely responsible to secure any third party approvals as necessary to conduct its operations at any portion of the Airport that is currently leased to another Airport tenant or user.

SECTION 4. SECTION 5, "FEES & DEPOSITS," subsections 5.2 and 5.3 are hereby restated in their entirety to read as follows:

"5.2 Concession Fee Calculation

Commencing on the MAG Commencement Date, Concessionaire shall pay to the City on a monthly basis, the greater of one-twelfth (1/12) of the MAG, as described below, or the Percentage Fee.

The Percentage Fee is set forth under the definition of Concession Fee.

If Concessionaire obtains any Gross Revenues from Concession Operations prior to the MAG Commencement Date, Concessionaire shall pay to City the Percentage Fee.

5.2.1 MAG Calculation

5.2.1.1 Initial MAG

Commencing upon the MAG Commencement Date, and continuing until October 31, 2020, the MAG shall equal the amount set forth in **Section 1** of this Agreement.

5.2.1.2 Annual MAG Adjustment.

The MAG shall be adjusted on an annual basis on the Annual Adjustment Date, as defined below. To make the MAG adjustment

easier for accounting purposes, the annual MAG adjustment shall be effective on the first day of a calendar month.

The first Annual Adjustment Date for the MAG shall occur November 1, 2020. Thereafter, November 1 of each year, shall serve as the Annual Adjustment Date. On each Annual Adjustment Date, the MAG shall be adjusted to equal eighty-five percent (85%) of the Concession Fee actually due to the City during the previous twelve (12) months. However, the MAG for any year shall not be less than the previous year's MAG.

Concessionaire shall not be entitled to any MAG reduction or other monetary compensation as a result of terminal evacuations ordered by the City or any other governmental authority.

5.2.1.3 MAG Payment

Concessionaire shall pay the monthly MAG payments in advance, without notice from City, on or before the first day of each calendar month during the Concession Term. Concessionaire's obligation to pay in each month one-twelfth (1/12) of the MAG shall be independent of any amounts paid in prior months.

5.2.1.4 Annualized Amounts

The Percentage Fee is due for each month of the Agreement and is not an annualized amount. There will be no annual reconciliation or credit to Concessionaire if amounts paid over the monthly MAG for any month or months based upon the Percentage Fee would exceed the fees owed if the Percentage Fee were calculated on an annual basis.

5.3 Monthly Concession Report

No later than twenty calendar (20) days after the end of each month occurring after the MAG Commencement Date, Concessionaire shall deliver to the City as rent a sum of money that represents the amount by which the Percentage Fee in the preceding month exceeds one-twelfth (1/12) of the MAG; and a Concession Report for the preceding month's activity, even if no money is due. If fees are due for any period less than a full calendar month, Concessionaire shall deliver the amount by which the applicable Percentage Fee exceeds the prorated MAG for such period.

If the Percentage Fee applicable to any month does not exceed the monthly MAG payment for any month, no additional percentage of Gross Revenues shall be due and payable for such month. The amount due and payable for such month shall be one-twelfth (1/12) of the applicable MAG. The Concession Report remains due no later than the twentieth (20th) day of each month for the preceding month's activity regardless if a Percentage Fee is not due for any such month.

If the monthly activity report is not provided on or before the twentieth (20th) day of each month as required herein, Concessionaire shall pay a fee for administrative expenses incurred by City for delays and invoices, an amount established by City Council Resolution, per calendar day that the report is late until such date as the monthly activity report is submitted to the Director."

SECTION 5. SECTION 5, "FEES & DEPOSITS," subsection 5.9 is hereby added to read as follows:

"5.9 Other Financial and Statistical Reports

No later than thirty (30) days after receipt of a request from the Director, Concessionaire shall furnish the City with such other financial or statistical reports as the Director, from time to time, may reasonably require, including but not limited to the purpose of determining the accuracy of Gross Revenues, labor compliance and FAA requirements (where applicable). Unless Concessionaire has requested

additional time to produce any such reports and Director has approved any such request, a Delinquent Report Fee in an amount established by Resolution of the City Council (as may be amended from time to time), will be assessed for each day any such additional records are not timely received by the City.”

SECTION 6. SECTION 19, “AMERICANS WITH DISABILITIES ACT,” subsection 19.a is hereby added to read as follows:

“**19.a Disability Access Disclosure.** Pursuant to California Civil Code Section 1938, City states that, as of the Effective Date of this Third Amendment, the Concession Area has not undergone inspection by a Certified Access Specialist to determine whether the Concession Area meet all applicable construction-related accessibility standards under California Civil Code section 55.53. A Certified Access Specialist (CASp) can inspect the Concession Area and determine whether the Concession Area comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the Concession Area, the City may not prohibit the Concession Area from obtaining a CASp inspection of the Concession Area for the occupancy or potential occupancy of the Concessionaire if requested by the Concessionaire. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection. The parties mutually agree that Concessionaire shall be responsible for the payment of any fees for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the Concession Area.”

SECTION 7. SECTION 35, “GENERAL CIVIL RIGHTS PROVISIONS” is hereby added to read as follows:

“SECTION 35 GENERAL CIVIL RIGHTS PROVISIONS

The (tenant/concessionaire/lessee) agrees to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person

shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance. If the (tenant/concessionaire/lessee) transfers its obligation to another, the transferee is obligated in the same manner as the (tenant/concessionaire/lessor).

This provision obligates the (tenant/concessionaire/lessee) for the period during which the property is owned, used or possessed by the (tenant/concessionaire/lessee) and the airport remains obligated to the Federal Aviation Administration. This provision is in addition to that required by Title VI of the Civil Rights Act of 1964.”

SECTION 8. SECTION 36, “TITLE VI CLAUSES FOR TRANSFER OF REAL PROPERTY ACQUIRED OR IMPROVED UNDER THE ACTIVITY, FACILITY, OR PROGRAM” is hereby added to read as follows:

“SECTION 36 TITLE VI CLAUSES FOR TRANSFER OF REAL PROPERTY ACQUIRED OR IMPROVED UNDER THE ACTIVITY, FACILITY, OR PROGRAM

A. The Concessionaire for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that:

1. In the event facilities are constructed, maintained, or otherwise operated on the property described in this Agreement for a purpose for which a Federal Aviation Administration activity, facility, or program is extended or for another purpose involving the provision of similar services or benefits, the (grantee, licensee, lessee, permittee, etc.) will maintain and operate such facilities and services in compliance with all requirements imposed by the Nondiscrimination Acts and Regulations listed in the Pertinent List of Nondiscrimination Authorities (as may

be amended) such that no person on the grounds of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.

B. With respect to this Agreement, in the event of breach of any of the above Nondiscrimination covenants, City will have the right to terminate the Agreement and to enter, re-enter, and repossess said lands and facilities thereon, and hold the same as if the Agreement had never been made or issued.”

SECTION 9. SECTION 37, “TITLE VI CLAUSES FOR CONSTRUCTION / USE / ACCESS TO REAL PROPERTY ACQUIRED UNDER THE ACTIVITY, FACILITY OR PROGRAM” is hereby added to read as follows:

“SECTION 37 TITLE VI CLAUSES FOR CONSTRUCTION/USE/ACCESS TO REAL PROPERTY ACQUIRED UNDER THE ACTIVITY, FACILITY OR PROGRAM

A. The Concessionaire for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree that (1) no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land, and the furnishing of services thereon, no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the Concessionaire will use the premises in compliance with all other requirements imposed by or pursuant to the List of discrimination Acts And Authorities.

B. With respect to this Agreement, in the event of breach of any of the above nondiscrimination covenants, City will have the right to terminate the Agreement

and to enter or re-enter and repossess said land and the facilities thereon, and hold the same as if said Agreement had never been made or issued.”

SECTION 10. SECTION 38, “DISADVANTAGED BUSINESS ENTERPRISES” is hereby added to read as follows:

“SECTION 38 DISADVANTAGED BUSINESS ENTERPRISES

During the performance of this Agreement, the Concessionaire, for itself, its assignees, and successors in interest (hereinafter referred to as the “Contractor”), agrees as follows:

Contract Assurance (49 CFR Part 26 §26.13) - The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.

Prompt Payment (49 CFR Part 26 §26.29) - The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) days from the receipt of each payment the prime contractor receives from City. The prime contractor agrees further to return retainage payments to each subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City. This clause applies to both DBE and non-DBE subcontractors.”

SECTION 11. Revised Exhibit A, “Concession Area” is amended to read as shown in Second Revised Exhibit A, attached and incorporated into this Third Amendment.

SECTION 12. Revised Exhibit C, “Concessionaire’s Equipment” is amended to read as shown in Second Revised Exhibit C, attached and incorporated into this Third Amendment.

SECTION 13. All of the terms and conditions of the amended Agreement not modified by this Third Amendment shall remain in full force and effect.

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WITNESS THE EXECUTION HEREOF on the day and year first written above.

“CITY”

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation of the State of California

KEVIN FISHER
Chief Deputy City Attorney

TONI J. TABER, CMC
City Clerk

Date:

“TENANT”

ALCLEAR, LLC,
a Delaware limited liability company
authorized to do business in the State of
California

Signature

Print Name

Title

Date

CERTIFICATE OF LLC AUTHORITY

This Certificate of LLC Authority shall be executed by the manager of the limited liability company.

I, _____, certify that I am the manager of the
Name of Manager
limited liability company named in the attached agreement;

that _____ signed the agreement on behalf of the limited
Name of Person that Signed Agreement

liability company as the _____ of the limited liability
Title of Person that Signed Agreement

company; and that the agreement was duly signed for and on behalf of the limited liability company by authority of its members, and is within the scope of its limited liability company powers.

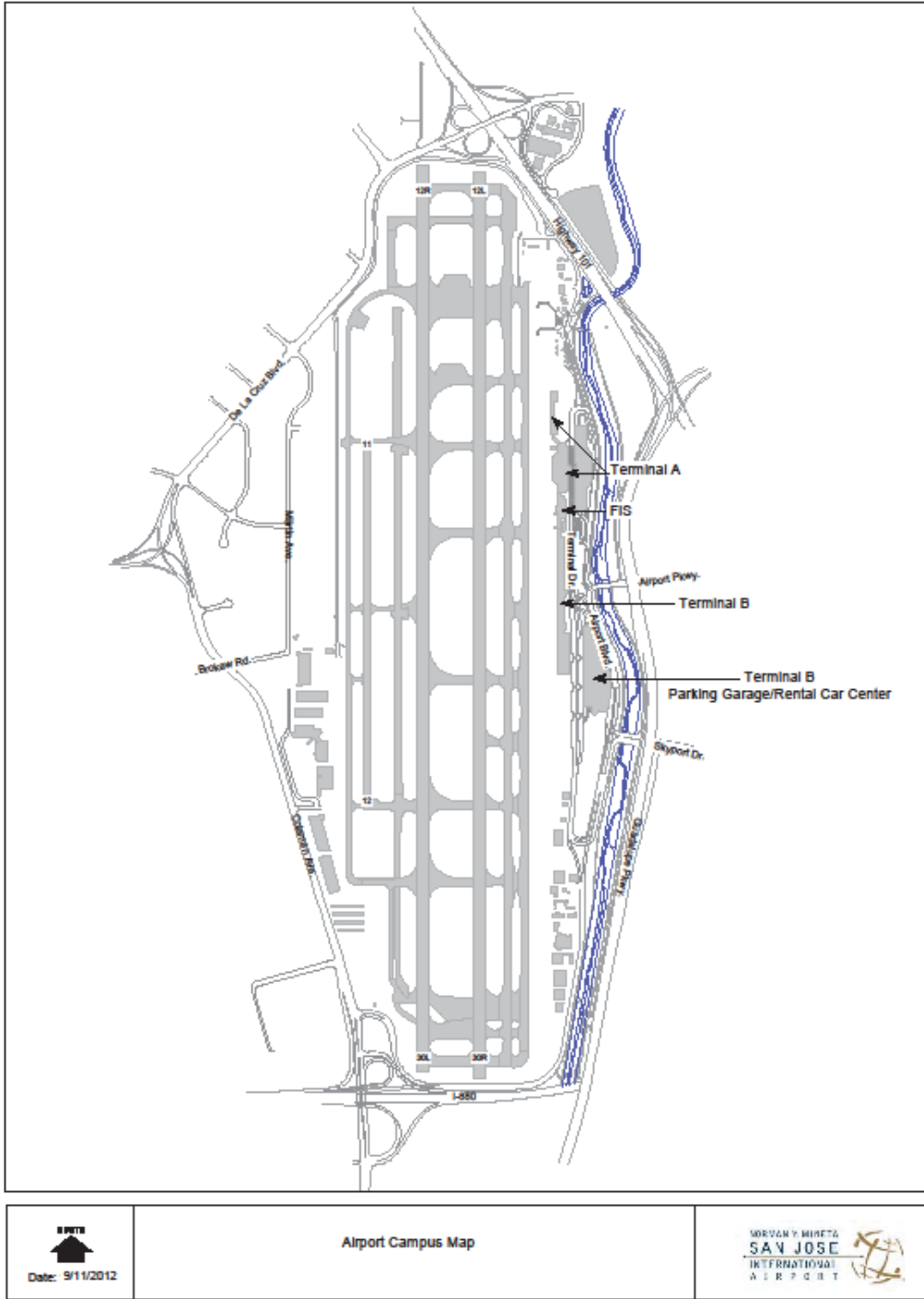
By: _____

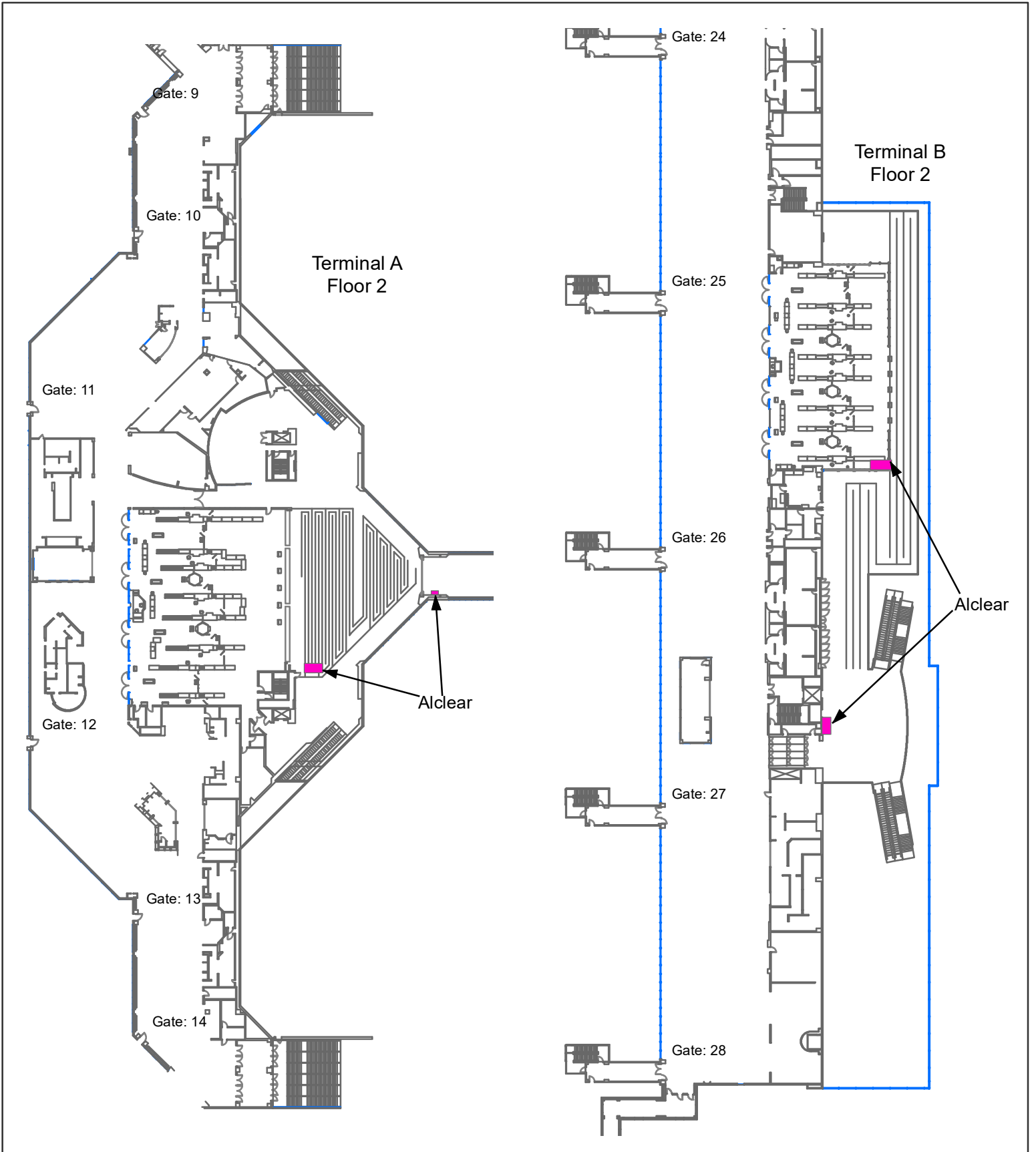
Name: _____

Its: Manager

Date: _____

SECOND REVISED EXHIBIT A CONCESSION AREA

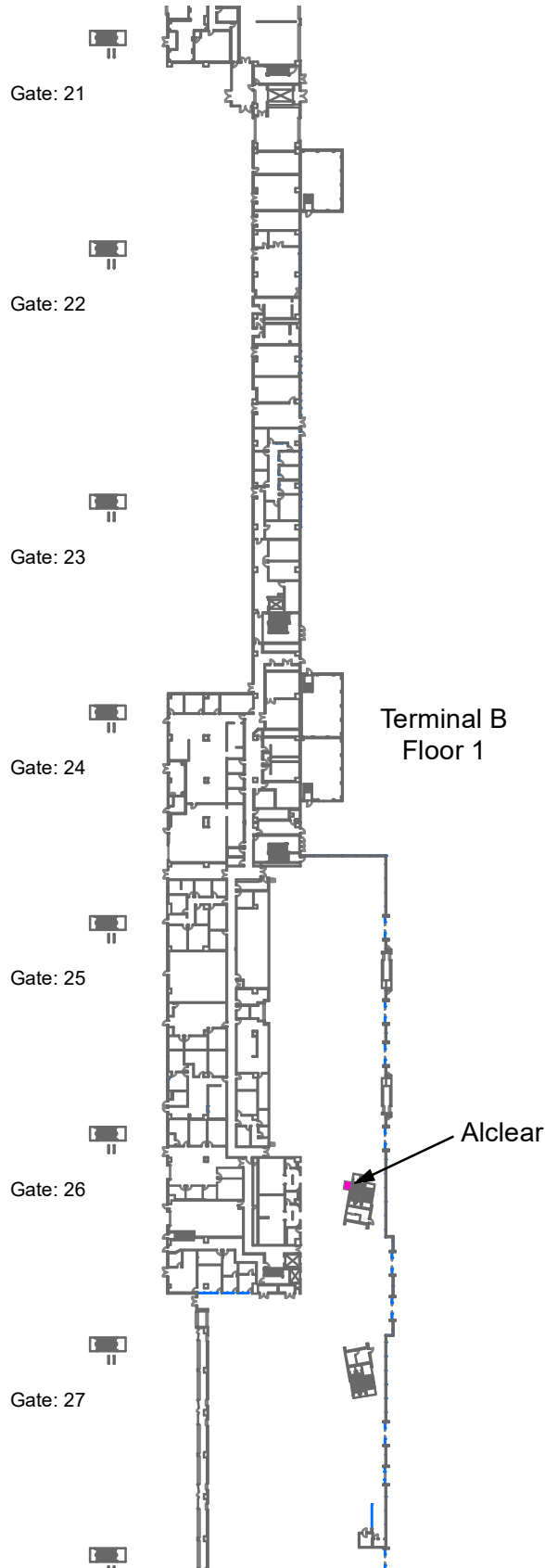




Alclear, LLC
Small Concession Agreement
10495-CA-13

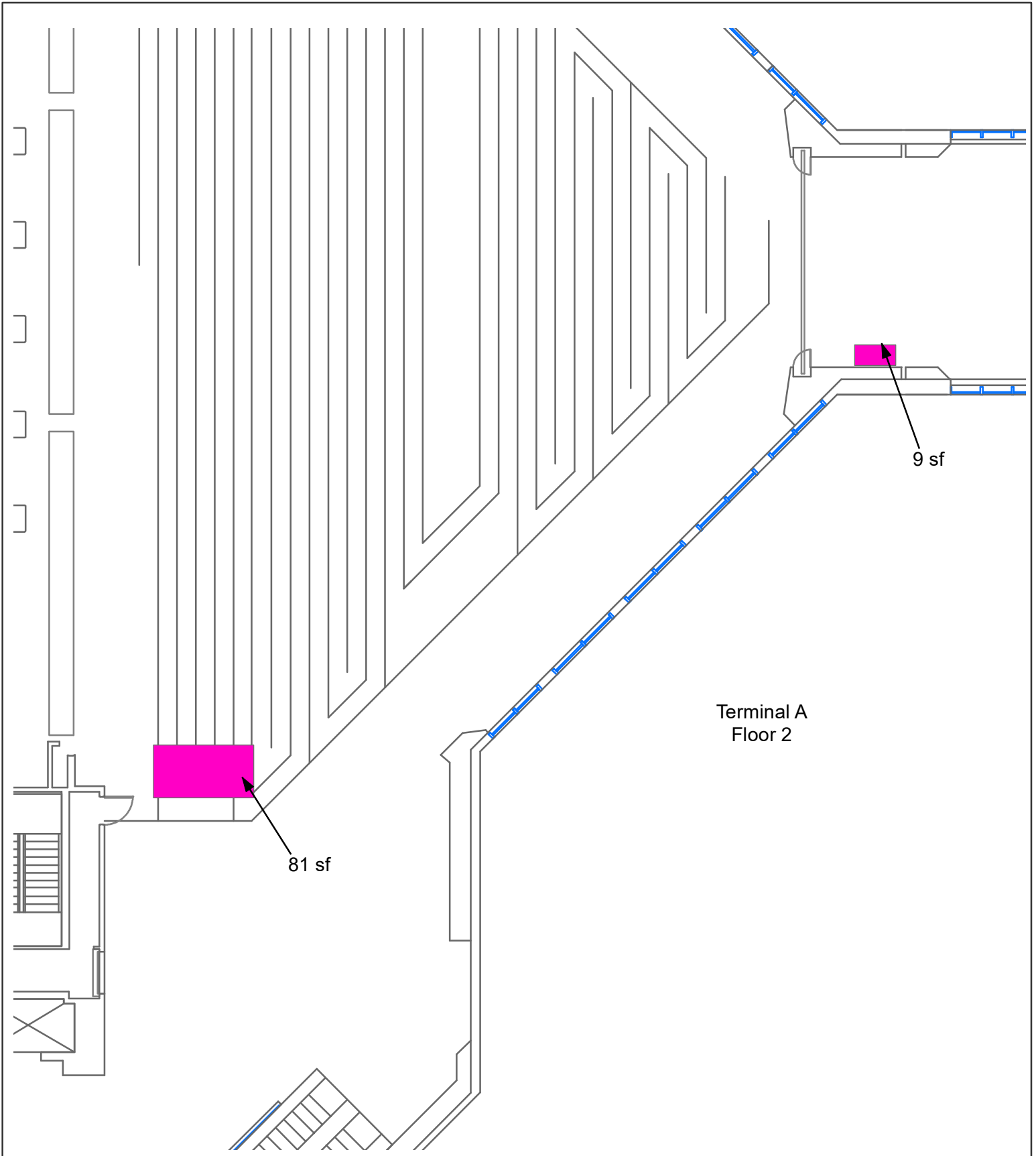


Second Revised Exhibit A



Alclear, LLC
Small Concession Agreement
10495-CA-13





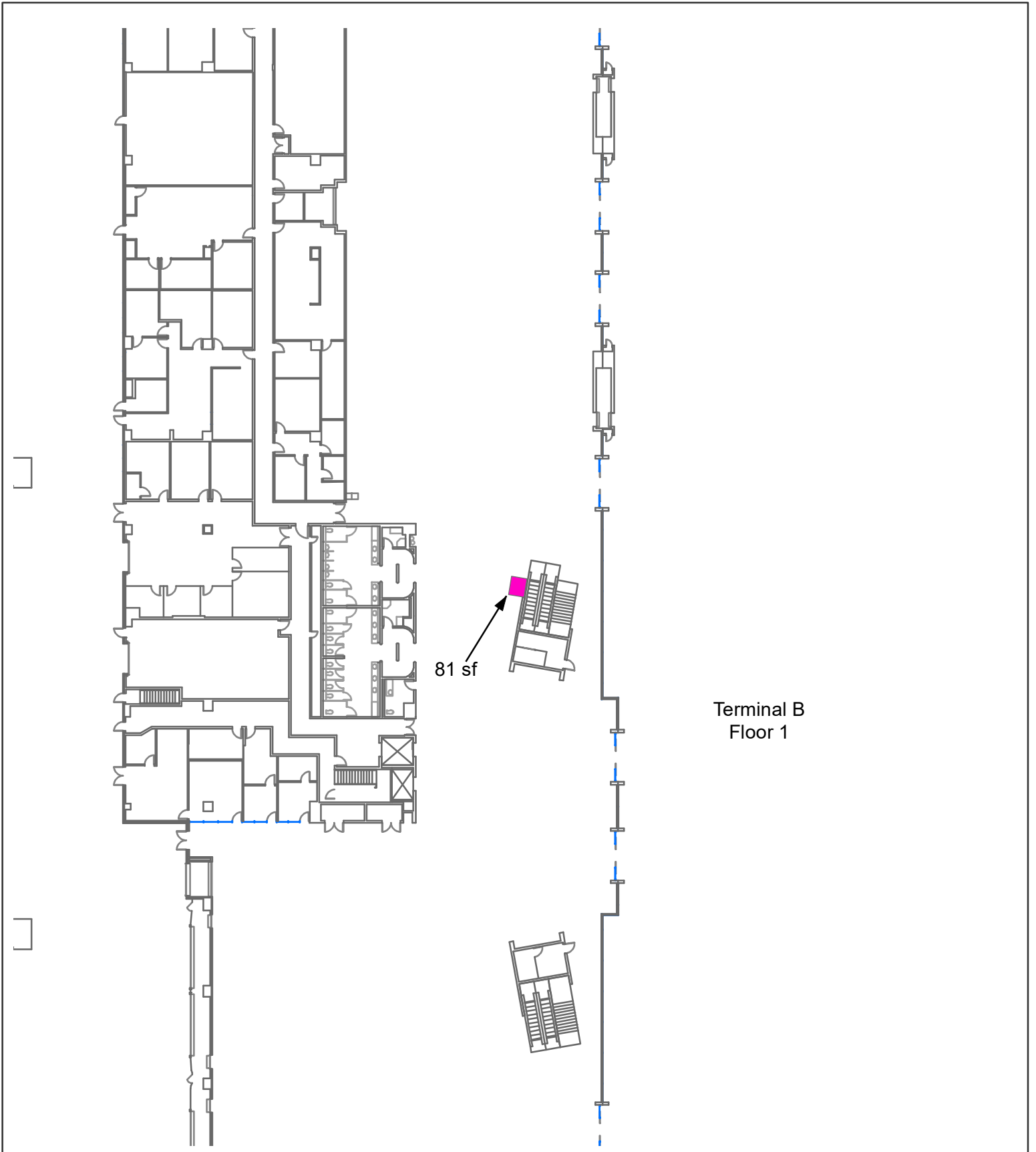
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Floor 2

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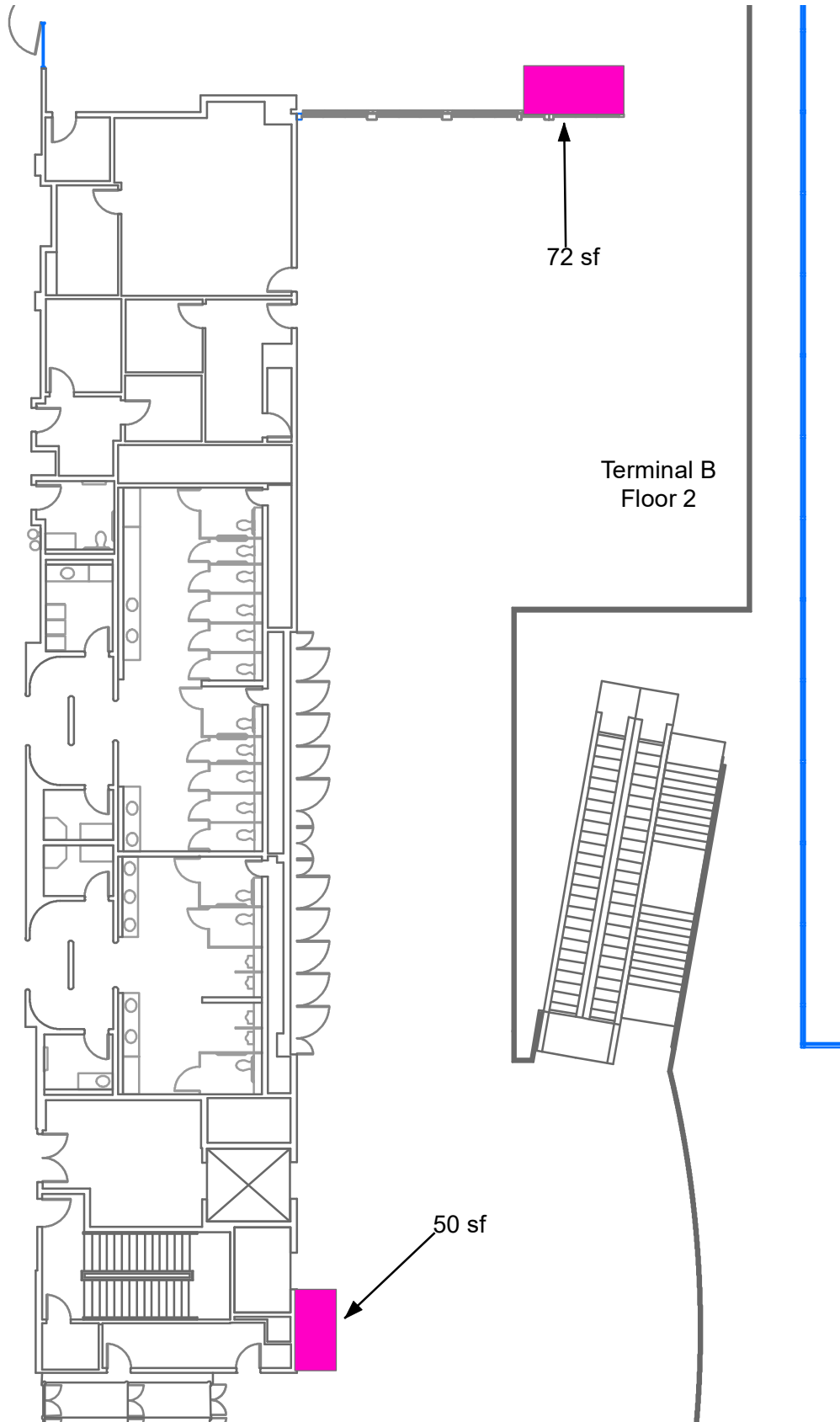
Terminal B
Floor 1

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SECOND REVISED EXHIBIT C CONCESSIONAIRE'S EQUIPMENT

Concessionaire shall install eight (8) verification kiosks (five in Terminal B and three in Terminal A) in the Concession Area shown on Second Revised Exhibit A.

Concessionaire shall install six (6) enrollment kiosks (two in Terminal A's enrollment locations and four in Terminal B's enrollment locations) in the Concession Area shown on Second Revised Exhibit A.